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IN THE

Supreme Court of the United States

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,

Petitioner,

v.

ELLA WILLIAMS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL COUNCIL ON DISABILITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

NANCY L. PERKINS
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5065

ARLENE MAYERSON*
DISABILITY RIGHTS EDUCATION AND DEFENSE FUND
2212 Sixth Street
Berkeley, CA 94710
(510) 644-2555

**Counsel Of Record*

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

The National Council on Disability ("NCD") submits this brief *amicus curiae* based on its unique perspective on and experience with disability law and policy.[1] NCD (formerly the National Council on the Handicapped) is an independent federal agency composed of 15 members appointed by the President and confirmed by the Senate. Pursuant to its statutory mandate, NCD is charged with reviewing federal laws, regulations, programs, and policies affecting people with disabilities, and making recommendations to the President, the Congress, and other federal officials and entities regarding ways to promote equal opportunity, economic self-sufficiency, and inclusion and integration into all aspects of society for Americans with disabilities. 29 U.S.C. § 781.

As this Court has recognized, the statute at issue in this case, the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"), originated from a proposal of NCD.[2] NCD first proposed the concept of the ADA in 1986. *See* National Council on the Handicapped, *Toward Independence* 18-21 (1986). In 1988, the NCD developed the original ADA bill that was introduced in the 100th Congress. *See* National Council on the Handicapped, *On the*

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[1] This brief was not authored, in whole or in part, by counsel for either party. No person or entity, other than the *amicus curiae*, its members and counsel, contributed monetarily to the preparation or submission of the brief. The parties consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

[2] *See Sutton* v. *United Airlines*, 527 U.S. 471, 484-85 (1999). *See also* 135 Cong. Rec. S10790 (daily ed. Sept. 7, 1989) ("The bill originated with an initiative of the National Council on Disability") (statement of Sen. Dole).

Threshold of Independence 27-39 (1988); S. 2345, 100th Cong., 134 Cong. Rec. 9379-82 (1988); H.R. 4498, 100th Cong., 134 Cong. Rec. 9599-9600 (statement of Rep. Coelho). Congress relied on and acknowledged the influence of NCD and its reports during congressional consideration and passage of the ADA.

Under its current statutory mandate, NCD is responsible for gathering information about the implementation, effectiveness, and impact of the ADA. NCD is thus intensely interested in ensuring that the ADA is interpreted and implemented in a manner consistent with the purposes for which it was proposed. NCD is also uniquely qualified to provide the Court with information about the background and framing of the ADA, implementation of the statute, and other information concerning issues affecting persons with disabilities. NCD is particularly concerned with and informed about the issue before the Court in this case, which is a threshold issue in all ADA cases: who is "disabled" and therefore protected by the ADA.

SUMMARY OF ARGUMENT

This case involves the proper interpretation of the definition of "disability" in the ADA, a threshold determinant of who will receive the protections the ADA provides. The specific question presented, whether "an impairment precluding an individual from performing only a limited number of tasks associated with a specific job qualifies as a disability," Petitioner's Brief ("Pet. Br.") at (i), may appear relatively narrow. As argued by Petitioner, however, the issue is in fact much broader: Petitioner is actually urging a radical rewriting of the test for identifying a "substantial limitation" – and thereby a "disability" – under the ADA. Petitioner's proposed test, if adopted by the courts, would prevent many individuals whom Congress intended the ADA to cover from receiving its protection,

including the provision of reasonable accommodations that they may need to secure and/or maintain employment.

In enacting the ADA, Congress recognized that individuals with a variety of disabilities were outside the economic and social mainstream of our society because of antiquated attitudes and the failure of employers and others to make modifications and accommodations to permit participation. Congress was particularly concerned about the extreme levels of unemployment faced by people with disabilities and adopted Title I of the ADA as a tool to encourage workplace participation. As part of the general ban on discriminatory policies and practices, Congress included in the ADA specific provisions requiring reasonable accommodation, which Congress found were "essential to accomplishing the critical goals of this legislation to allow individuals with disabilities to be part of the economic mainstream of our society." S. Rep. No. 101-116, at 10 (1989) [hereinafter "Senate Rep."]; H.R. Rep. No. 101-485, pt. 2, at 34 (1990) [hereinafter "House Rep."].

Congress recognized that exclusion takes place in a variety of ways to people with various types of disabilities. To address this problem broadly, Congress adopted an inclusive, three-prong definition of "disability," tracking the definition of "handicap" in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"). Under this definition, an individual is deemed disabled either if he or she has an impairment that "substantially limits" one or more major life activities, or if she or he has either a record of such an impairment or is regarded as having such an impairment. 42 U.S.C. § 12102(2)(A), (B) & (C). Under the Equal Employment Opportunity Commission ("EEOC") regulations implementing the ADA, being "substantially limited" in a major life activity means being either "unable to perform a major life activity . . . *or significantly restricted* as to the condition, manner or duration under which [the]

individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1)(i), (ii) (emphasis added).

In this case, Petitioner attempts to erect a "rigorous threshold" for ADA coverage, Pet. Br. at 10, by devising its own test, without statutory or other foundation. According to Petitioner, "individuals claiming coverage under the ADA must demonstrate that they are *severely restricted* from using their hands to perform a *broad range of basic functions* needed to meet the *essential demands of everyday life*." Pet. Br. at 12-13 (emphasis added). This test is at odds with the statute, its legislative history, and the implementing regulations. The crux of Petitioner's argument reveals the extreme consequences of its position. Petitioner relies on the reasoning of the district court, which found Respondent's claim that she was substantially limited in manual tasks to be "irretrievably contradicted by her continual insistence that she could perform the tasks in assembly and paint inspection without difficulty; positions requiring manual tasks." Pet. Br. at 7, 9. Since Petitioner itself characterizes the jobs that Ms. Williams was performing as being "modified duty," and the "easiest jobs" in the plant, Pet. Br. at 5, Petitioner is in essence arguing that a plaintiff must be totally unable to do even modified tasks in order to be "substantially limited" in manual tasks and/or working.

Petitioner's Draconian position exemplifies its erroneous view that Congress intended to extend ADA protection only to the "truly disabled" – persons who, according to Petitioner, are so severely restricted that they are unable to meet the essential demands of daily life. Pet. Br. at 12-13. Petitioner's concept of the "truly disabled" reinforces the stereotypical view of disability that Congress sought to reverse in overwhelmingly passing the ADA. The

notion of the "truly disabled" comes from the social welfare arena where the determination of "disability" is used to decide who should be excused from societal obligations, including work. The ADA embodies a very different notion of people with disabilities – individuals who have the talent, skills, abilities, and desire to participate actively in society but are precluded from doing so because of antiquated attitudes or the failure to provide reasonable accommodations. ADA plaintiffs are not asking to be excused from participation and receive monetary benefits. ADA plaintiffs, like Respondent herself, are those who would rather keep working than go on the welfare rolls.

Using the tests set forth in the ADA implementing regulations and this Court's decisions in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), *Murphy v. UPS*, 527 U.S. 516 (1999), and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), instead of the harsh criteria concocted by Petitioner, a jury could properly find that Respondent is "disabled" within the meaning of the ADA because she is significantly restricted as to the condition, manner and duration of performing manual tasks as compared to the average person in the general population. Allowing her to proceed on her ADA claim simply permits her to have her day in court to determine whether she could have been reasonably accommodated in order to keep her job.

I. THE INTERPRETATION OF "SUBSTANTIAL LIMITATION" URGED BY TOYOTA RUNS COUNTER TO THE PURPOSES OF THE ADA.

This case involves an employee who has significant restrictions in manual activities – restrictions that, contrary to Petitioner's portrayal, limit her ability to perform manual tasks far beyond the "single," "particular" job to which Petitioner assigned her. This is an employee who was working and could have continued to do so had Petitioner

not reassigned her to a job that she could not perform. This is precisely the type of individual who Congress found would benefit from the employment provisions of the ADA.

As emphasized in the legislative history of the ADA, "[r]easonable accommodation is a key requirement of the Rehabilitation Act and of this Act." House Rep., pt. 2, at 33; Senate Rep. at 32. After reviewing governmental and private studies that revealed "staggering levels of unemployment" among people with disabilities,[3] Congress concluded that "the provision of all types of reasonable accommodations is essential to accomplishing the critical goal[s] of this legislation – to allow individuals with disabilities to be part of the economic mainstream of our society." Senate Rep. at 10; House Rep., pt. 2, at 34.[4] As demonstrated below, the miserly reading of "disability" suggested by Petitioner would prevent many individuals who Congress intended to be protected by the ADA from receiving the reasonable

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[3] Senate Rep. at 9; *see also* House Rep., pt. 2, at 32 (*citing* Louis Harris & Assocs., *The ICD Survey of Disabled Americans: Bringing the Disabled into the Mainstream* 50 (1986) (finding that two-thirds of working age disabled Americans were unemployed even though the majority (66%) of those individuals wanted to work) and U.S. Dept. of Commerce, Bureau of the Census, *Labor Force Status and Other Characteristics of Persons with Disabilities* 2 (1989) (finding that twice as many adults with disabilities had household incomes of $15,000 or less compared to adults without disabilities)).

[4] "[T]his bill will help our country use an immense amount of talent, intelligence, and other human resources which heretofore have been underestimated, underdeveloped, and underutilized." 136 Cong. Rec. H2433 (daily ed. May 17, 1990) (statement of Rep. Luken). "Our economy can no longer afford not to enlist the unique abilities and talents of people with disabilities." 135 Cong. Rec. S10791 (daily ed. Sept. 7, 1989) (statement of Sen. Riegle).

accommodation they need to secure and/or maintain employment.

A. Petitioner's "Rigorous Threshold" Test Is Without Statutory or Other Foundation.

The critical issue presented by this case, which affects each and every ADA case, is how properly to determine whether an individual is "substantially limited in a major life activity."[5] Petitioner proposes a test for the "substantially limited" determination that would preclude an affirmative finding for virtually any individual who is able to live an independent, productive life. But as the ADA's text, implementing regulations and legislative history reveal, such an individual is precisely who Congress intended the ADA to benefit.[6]

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[5] NCD does not endorse the Sixth Circuit's opinion to the extent it is read to limit the manual tasks inquiry to a focus on "job-related" tasks. The proper approach is to consider *all* restrictions, including those both at home and at work, in determining whether an individual is substantially limited in manual tasks. This is especially true in a case like this, where Respondent's activities in one sphere affect her activities in others.

[6] Petitioner's arguments based on the congressional finding of 43,000,000 people with disabilities are misplaced. As the Court noted in *Sutton*, the ADA finding referring to this number originated in a corresponding finding in a report by the NCD. *Sutton*, 527 U.S. at 484-85. Neither NCD nor Congress intended that such a figure represent the number of persons to be protected by the ADA; rather, the figure was presented as a rough estimate of the persons *then* having *actual* disabilities. The ADA's three-prong definition of "disability," in contrast, covers not only those with actual disabilities but also those who have a "record of" or are "regarded as having" a substantial impairment. 42 U.S.C. § 12102(2)(B)-(C)). The number of persons protected under the

(footnote continued on next page)

The EEOC regulations implementing Title I of the ADA define a "substantial limitation" as a significant restriction in the "condition, manner or duration under which the average person ... can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1)(ii). Manual tasks are explicitly recognized as a major life activity.[7] *Id.* Petitioner, while professing loyalty to the EEOC regulations and accompanying guidance, in fact makes up its own test for determining a substantial limitation in manual tasks: "individuals claiming coverage under the ADA must demonstrate that they are *severely restricted* from using their hands to perform a *broad range of basic functions* needed to meet the *essential demands of everyday life*." Pet. Br. at 12-33 (emphasis added).

Petitioner's proposed heightened requirements are built on a faulty premise. First, the EEOC regulations define a person as "substantially limited" if he or she is

(footnote continued from previous page)

three-prong definition is necessarily indeterminant: it includes all those who are subjected to discrimination because they are perceived or treated as having a disability, whether or not they actually do.

In any event, in discussing the 43,000,000 figure, this Court in *Sutton* concluded that Congress favored a functional approach to determining who is disabled. *See Sutton*, 527 U.S. at 485-86. Such a functional approach is fully consistent with the analysis presented by NCD here.

[7] The inclusion of manual tasks as a major life activity is codified at 42 U.S.C. § 12201(a), which incorporates by reference the standards applied under the various federal agencies' regulations implementing Section 504, which uniformly list "manual tasks" as a major life activity. *See, e.g.*, 7 C.F.R. § 15b.3(k) (Dep't of Agric.); 32 C.F.R. § 56.3(c)(2) (Dep't of Defense); 28 C.F.R. § 42.540(k)(2)(ii) (Dep't of Justice).

"significantly restricted" – not, as Petitioner would have it, only if he or she is "*severely* restricted." Second, Petitioner refers to "basic functions," a term it uses interchangeably with "basic activities" and "basic tasks," apparently in reliance on a portion of the EEOC guidance explaining that the "major life activities" listed in the guidance are not exhaustive, and that other "basic activities" may also constitute major life activities.[8] In this case, however, there is no need to decide if the life activity at issue is "basic," because "manual tasks" is a specifically listed "major life activity." Once a major life activity is identified, the inquiry turns to restrictions in the manner, condition and duration under which the activity is performed in comparison to the average person. No further consideration of whether the relevant activity is "basic" is appropriate.

Petitioner bases the crux of its argument on the fact that Respondent is able to perform *some* manual activity. Petitioner adopts the reasoning of the district court that Ms. William's claim (that she was substantially limited in manual tasks) was " 'irretrievably contradicted by her continual insistence that she could perform the tasks in assembly and paint inspection without difficulty; positions requiring manual tasks.' " Pet. Br. at 7 (quoting Pet. App. 36a). Since Petitioner itself characterizes the jobs that Ms. Williams was performing as being "modified duty," and the "easiest jobs" in the plant, Pet. Br. at 5 (citing Pet. App. 25a), Petitioner is in essence arguing that a plaintiff must be totally unable to do even modified tasks in order to be "significantly restricted" in manual tasks and/or working.

With respect to Ms. William's particular impairment, Petitioner asserts that a person with CTS could be

[8] *See* Pet. Br. at 3 (citing 29 C.F.R. § 1630.2(i), (j)(1)(ii) & Appendix).

substantially limited in manual tasks only if the CTS were "so severe that it *precludes* an individual from performing a *broad range* of *basic* manual functions that the average person typically performs without difficulty." Pet. Br. at 18, n.6 (emphasis added). While this test reflects one way that a plaintiff may show a substantial limitation, *see* 29 C.F.R. § 1630.2(j)(1)(i) (unable to perform), it totally ignores the alternative basis for making such a showing that is relevant here – that the plaintiff, while not precluded, is significantly *restricted* from performing manual tasks. *See id.* § 1630.2(j)(1)(ii) (significantly restricted).

Such restriction is plainly present in this case. The evidence in the record demonstrates substantial restrictions in the condition (pain),[9] manner (numerous restrictions on activities),[10] and duration (time restrictions)[11] under which Ms. Williams can perform manual tasks as compared to the

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[9] Ms. Williams' conditions are inherently painful. As noted in the William J. Weikel, Ph.D., Vocational Report, her conditions include, among others: bilateral tenderness, peritendinitis inflammation, myofascial pain, and rotator cuff tendinitis. (J.A. 37.)

Ms. Williams experiences pain and discomfort daily. *See* J.A. 35.

[10] Since 1992, Ms. Williams' manual activity involving repetitive activity, lifting, and overhead work has been permanently restricted. J.A. 43. Toyota's doctors added to these permanent restrictions the additional restrictions: "no above chest level, extended reach, or repetitive rotary or lateral movements of head/neck." J.A. 43-44.

[11] *See, e.g.*, J.A. 35 ("Sitting for a long period of time and not moving and stirring, it hurts"); J.A. 36 (After driving approximately 60-80 miles, "I'm feeling the nerves tingling in my shoulder, and my neck tightens up, and I get into quite a bit of pain.").

condition, manner and duration under which the average person in the general population can perform such tasks.[12]

Petitioner correctly points out that Congress did not intend to cover "[a] person with a minor trivial impairment." Pet. Br. at 25. What Petitioner fails to acknowledge is the type of impairment Congress considered to constitute a "trivial impairment": for example, "a simple infected finger." Senate Rep. at 23; House Rep., pt. 2, at 52. In fact, Congress used this example to demonstrate that substantial meant nontrivial. It is callous at best to compare Respondent's significant medical conditions and functional restrictions to the condition of someone suffering from a simple infected finger. It is also plainly misguided to compare Ms. Williams to someone who cannot walk 11 miles without pain, as Petitioner does with reference to an example in the EEOC guidance. *See* Pet. Br. at 26 (citing House Rep., pt. 2, at 52; Senate Rep. at 23). The point of the EEOC example is to demonstrate that, since most people would experience similar pain at the eleventh mile, the walker is no different that any member of the general public. There is no plausible basis for Petitioner's suggestion that a person with numerous physical impairments, and numerous physical restrictions, is the same as any other member of the general public.

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[12] Respondent's manual tasks claim is not limited to working, but rather is based on evidence in the record that establishes her substantial restrictions at home and work. As the Sixth Circuit explicitly recognized: "Here, the impairments of limbs are sufficiently severe to be like deformed limbs and such activities affect manual tasks associated with working, as well as manual tasks associated with recreation, household chores and living generally." Pet. App. 6a.

B. Limiting Coverage to the Group That Petitioner Characterizes as the "Truly Disabled" Would Defeat the Core Goals of the ADA.

Petitioner attempts to justify its contention that, in order to be deemed "disabled" under the ADA, a person must be *severely* restricted in performing the *essential* demands of daily life, Pet. Br. at 12, 13, by invoking a misguided notion that the ADA was meant to "extend only to those who are truly disabled." Pet. Br. at 10, 11, 18, 29-33.[13] According to Petitioner, Respondent is not disabled because she can "brush her teeth, she can do the laundry, she can pick up items from the floor, . . . she can drive a car" and she was able to do her old job (which Petitioner admits was the easiest job in the plant). Pet. Br. at 18, 5. Petitioner asserts that this is "simply not the case for the person who has

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[13] The exact origin of the phrase "truly disabled" is unclear. However, it has been used in the Social Security income context to mean individuals who are unable to support themselves. In *Schweiker v. Chilicky*, 487 U.S. 412 (1988), Justice O'Conner's majority opinion cited portions of the Congressional Record in which Senator Moynihan referred to the way in which the Social Security Administration "has tried to reduce program cost by terminating the benefits of hundreds of thousands of truly disabled Americans," and Congressman Rostenkowski spoke of "massive numbers of beneficiaries who have lost their benefits over the last 3 years even though they are truly disabled and unable to work." *Id.* at 416 (citing Congressional Record). To this point, then, the United States Supreme Court has only recognized the phrase "truly disabled" in reference to traditional social welfare legislation in which the meaning of disability serves a pure gatekeeper function with regard to monetary benefits and other types of compensation. The phrase was used during the ADA legislative process only by members of Congress who opposed the current definition. *See infra* note 22.

missing or deformed limbs,"[14] an example of Petitioner's "truly disabled" and legitimate ADA plaintiff. Pet. Br. at 18.

Petitioner's notion of the "truly disabled" belies the ADA's text implementing regulations and legislative history. If Congress had been interested only in the mythic "truly disabled" person, it would not have adopted a definition of disability that had been given broad agency and court interpretations under Section 504. In 1977, the Department of Health, Education and Welfare ("HEW"), which had the responsibility to issue Section 504 regulations, explicitly rejected a plea to limit Section 504 coverage to "traditional" disabilities. HEW relied on the breadth of the statutory language and concluded that it could not be reconciled with an interpretation that would limit coverage to "persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps."[15] As this Court stated in *School Board of Nassau County v. Arline*, 480 U.S. 273, 280 n.5 (1987), the definition is broad but only those who are qualified are eligible for relief.

Petitioner's narrow concept of disability invokes an earlier era that Congress clearly meant to reverse in enacting

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[14] Pet. App. 4a (citing the Sixth Circuit's opinion below).

[15] 42 Fed. Reg. 22,676, 22,685 (1977). The agency did not limit definition to traditional disabilities because of the "difficulty of ensuring the comprehensiveness of any such list," particularly in light of the fact that new disorders may develop in the future. *School Board of Nassau County v. Arline*, 480 U.S. 273, 280 n.5 (1987) (*citing* 45 C.F.R. pt. 84, App. A, at 310 (1985)). *See also* Senate Rep. at 22 (same). Consistent with the HEW approach and *Arline*, the courts have recognized a wide variety of disabilities for purposes of Section 504 protection. *See* Robert L. Burgdorf, Jr., Disability Discrimination in Employment Law 137-40 (1995) (citing cases).

the ADA. Petitioner's notion of a "truly disabled" person comes from an era where the "disability" label excused people from societal obligations.[16] The ADA envisions a very different notion of persons with disabilities: people who have the talent, skills, abilities, and desire to participate, but are precluded from doing so because of antiquated attitudes or the failure to provide reasonable accommodations.[17] ADA plaintiffs are not asking to be excused from participation and receive monetary benefits. ADA plaintiffs are those who would rather keep working than go on the welfare rolls.[18] The phrase "truly disabled" harks back to an era when social welfare was the prominent response to disability. In enacting the ADA, Congress expressly recognized that this paternalistic, albeit well-intentioned, notion of disability caused isolation and

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[16] *See* Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. Rev. 361 (1996). *See also* Deborah Stone, *The Disabled State* (Philadelphia: Temple University Press, 1984). Unlike the ADA definition, the disability definition under the Social Security statute requires an inability to work. *See* 42 U.S.C. § 1382c(a)(3)(A).

[17] As Congress recognized, among the major reasons that people with disabilities are discriminated against in the workplace are "standards and criteria that have the effect of denying opportunities; failure to provide or make available reasonable accommodations." Senate Rep. at 9 (1989).

[18] Congress was persuaded that the ADA employment provisions would result in "more persons with disabilities working, in increased earnings, in less dependence on the Social Security System for financial support, in increased spending on consumer goods, and increased tax revenues." Senate Rep. at 17 (quoting Att'y Gen. Thornburg). As Congress noted, a 1987 Harris poll had found that 82% of people with disabilities said they would give up benefits in favor of a full-time job. *See id.* at 9.

exclusion from the mainstream of society to an extent utterly incompatible with the equal opportunity guaranteed by our nation's civil rights laws. Congress sought through the ADA to reverse stereotypical views of people with disabilities as unable to function in and contribute to society.

In referring to a person with visibly "deformed" arms and hands as one who is "truly disabled," Pet. Br. at 18, Petitioner simply assumes that, unlike Ms. Williams, such a person could never drive a car, do the laundry or perform personal hygiene activities.[19] Yet such an individual can readily drive a modified vehicle, speak on a phone with a headset, and use various home appliances. The mere fact that such persons have invested in creating home environments that can accommodate their personal physical needs and enable them to perform "a broad range of basic functions" certainly does not mean that they will not encounter discrimination in the employment market, or that the ADA should not be applied to ensure that they can ask for reasonable accommodations such as modified keyboards or headphones in the workplace.

By raising the specter of the "truly disabled," Petitioner is attempting to resurrect society's stereotypes about disability, suggesting that disabled people must be visibly and functionally *un*able to perform in certain specific,

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[19] Petitioner's assumptions are based on the types of stereotypes the ADA is designed specifically to address. Without denying the difficulties that such persons encounter in a world that assumes their inabilities, many persons with "missing or deformed limbs" live highly functional and independent lives. For example, Stacey Conner, born without arms, "dresses herself every morning with the help of a suction cup and a stick" and "mostly does everything anybody else does in her own way." Jess Williams, *Don't Fix Me I'm Not Broken*, Stephenville Empire-Tribune, Jan. 1989.

socially expected ways before they are entitled to the protection of law. These are the very social stereotypes that subject persons with disabilities to discrimination in the first place. In opposition to this, the ADA and the EEOC regulations, consistent with Congress' intent, are designed to protect persons with disabilities who are able to do many things, ordinary and extraordinary.

Senator Dole, during the congressional debates on the ADA, expressed a vision of a future where people with disabilities would be able to fully participate in society: "Living independently and with dignity means opportunity to participate fully in every activity of daily life. . . . The ADA offers such opportunity to persons with disabilities." 136 Cong. Rec. S9695 (daily ed. July 13, 1990) (statement of Sen. Dole). It would be ironic indeed if this promise of the ADA were the death-knell to ADA coverage.

Senator Harkin, a primary author and sponsor of the ADA, referred to the wide range of people with disabilities to be covered by the Act, including "an elderly grandmother with arthritis, but determined to fend for herself and live her retirement years in dignity." 135 Cong. Rec. S10712 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin). Would this individual be precluded from bringing an ADA claim if she still did some household chores and had a volunteer job at the library?

The fundamental goal of the ADA to integrate people with disabilities in all aspects of economic and social life would be undermined if participation itself was evidence of no substantial limitation and therefore no disability. The ability to do some jobs and some household chores cannot strip away protection against discrimination, including the provision of reasonable accommodation, if the ADA is to be

honored consistent with Congress' view of people with disabilities as able, talented and skilled.[20]

C. Congress Chose Not To Limit Coverage Under the ADA Based on Speculation About Costs.

Petitioner asserts that extending the protective reach of the ADA to persons with limiting impairments who are "otherwise capable" of functioning in basic activities "will inexorably siphon off the resources employers can devote to assisting truly disabled persons." Pet. Br. at 30. This purportedly altruistic suggestion not only is suspect as a matter of economics, but also ignores one of the fundamental decisions made by Congress in enacting the ADA. Defining "disability" narrowly in order to conserve resources to protect only the "truly disabled" was never advocated, and is not now endorsed, by NCD – the agency that originally proposed the ADA – or by any of the other disability rights organizations that urged the ADA's adoption or have joined as *amici* in this case. As intended by these organizations and Congress, the ADA addresses the problem of limited employer resources not through the definition of "disability," but rather by limiting the accommodations an employer must make for persons with disabilities to those that do not impose an "undue hardship" on the employer's business. 42 U.S.C. § 12112(b)(5)(A).

Throughout the legislative process, Congress heard cost-based objections to the proposed reach of the ADA,

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[20] *See, e.g.*, 135 Cong. Rec. S10793 (daily ed. Sept. 7, 1989) ("Too many people forget that the disabled have many abilities as well as disabilities.") (statement of Senator Biden).

specifically in the context of the definition of disability.[21] Remarkably, one opponent of the ADA phrased his objections in virtually identical terms as those used by Petitioner here. Representative Craig stated:

> One of my strongest objections to this bill is that it [. . . would] *siphon away* the benefits and protection that should be reserved for the *truly disabled*. I am speaking here about the definition of a disability in terms of coverage under this act.[22]

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[21] However, "[s]everal witnesses also explained that Title I of the ADA (employment discrimination) is modeled after regulations implementing the Rehabilitation Act of 1973 . . . and that compliance with these laws has been 'no big deal.' " Senate Rep. at 10. In fact, findings with respect to compliance with the ADA belie the cost objectives voiced during the legislative process. *See, e.g.,* Louis Harris & Assocs., *The N.O.D./Harris Survey on Employment of People with Disabilities* 33 (1995) ("During the debate about the ADA, much was made of the perception that the costs would be prohibitive. This is not the case for most employers.") The 1995 Harris survey reported that 79% of employers said the inclusion of more people with disabilities into the workforce was a "boost to the nation." *Id.* at 21.

[22] Representative Craig was particularly concerned about the ADA's inclusion of persons with HIV within the definition of disability, as well as others whom he did not consider to be "truly disabled." Representative Delay opposed the legislation on the ground that it "just about makes everyone disabled, whether you are truly disabled and show symptoms of disability." 136 Cong. Rec. H2315 (daily ed. May 15, 1990). Representative Dannemeyer suggested limiting the ADA's protection to "those who are disabled as a result of birth or accident. They are truly disabled people, and we should be passing Federal legislation to protect people in that unfortunate status." 136 Cong. Rec. H4613 (daily ed. July 12, 1990).

136 Cong. Rec. E1774 (emphasis added). Likewise, a witness for the National Federation of Independent Businesses urged that Congress provide an exclusive list of disabilities as a way of limiting the costs of accommodation.[23] This and other suggested means of limiting the definition of "disability" for cost reasons were specifically rejected by Congress. As Representative Hoyer explained:

> Throughout the process on the ADA, we were often asked to substitute for this definition a list of selected disabilities that would be the only disabilities covered under the act. *That approach was rejected by every committee*. Instead, the act retains the flexibility definition that was first adopted in Section 504 of the Rehabilitation Act of 1973, that has been in effect for over 15 years, and that was recently explicated clearly by the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

136 Cong. Rec. E1914 (emphasis added).

Ironically, following the suggestion of Petitioner to limit ADA coverage to those it characterizes as "truly

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[23] *Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. 89-90 (1989) (statement of John J. Motley III, National Federation of Independent Businesses). Certain members of Congress reiterated this proposal. *See* 136 Cong. Rec. H2621 (daily ed. May 22, 1990) (statement of Rep. McCollum); 135 Cong. Rec. S10772 (daily ed. Sept. 7, 1989) (statement of Sen. Armstrong).

disabled" would preclude accommodations for persons with disabilities that employers can provide at minimal or no cost. As specifically stated in the legislative history:

> The legislation also specifies, as examples of reasonable accommodation, job restructuring, part-time or modified work schedules and reassignment to a vacant position. . . . Part-time or modified work schedules can be a no-cost way of accommodation. . . .
>
> Reasonable accommodation may also include reassignment to a vacant position. If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and the employer from losing a valuable worker.

Senate Rep. at 31-32.

Ms. Williams is a quintessential example of a disabled person who may be accommodated in the workplace at minimal or no cost. In light of the "undue hardship" provision in the ADA, properly understanding the statute's definition of "disability" to include impairments such as those of Ms. Williams plainly would not "siphon off" resources from those most deserving of ADA protection.

II. AN IMPROPER INTERPRETATION OF THE "SINGLE JOB" EXCEPTION EXCLUDES FROM ADA PROTECTION MANY WHOM CONGRESS INTENDED TO COVER.

This Court need not address the question whether Respondent is substantially limited in working in order to decide this case. However, in the event the Court does address the issue, Petitioner's misstatement of the proper test for resolving that question warrants response, particularly in light of the disturbing trend in the lower courts to overapply the "single job" exception to a finding of a substantial limitation in working.[24]

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[24] Many courts have misapplied the "single job exception" to find that plaintiffs are not substantially limited in the major life activity of working, despite the fact that the plaintiff's impairment would also impact the ability to perform jobs, in addition to the one at issue, requiring the same tasks. *See, e.g.,* Arlene B. Mayerson, *Restoring Regard for the "Regarded as" Prong: Giving Effect to Congressional Intent*, 42 Vill. L. Rev. 587, 598 n.47 (1997) (citing cases in which plaintiffs were found not to be disabled despite the fact that their impairments would limit the ability to perform many jobs); Robert L. Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 Vill. L. Rev. 409, 540 (1997) ("The exclusion-from-one-job-is-not-enough formula has resulted in, or contributed to, the dismissal of ADA or section 504 of the Rehabilitation Act claims by plaintiffs with [various serious impairments]."). Not all courts have followed this trend. *See, e.g., Fitzpatrick v. City of Atlanta,* 2 F.3d 1112 (11th Cir. 1993); *Leslie v. St. Vincent New Hope, Inc.*, 916 F. Supp. 879 (S.D. Ind. 1996); *Scharff v. Frank*, 791 F. Supp. 182 (S.D. Ohio 1991).

Under the EEOC standard, an ADA plaintiff is "substantially limited" in working if she can establish that she is significantly restricted in the ability to perform either (1) a class of jobs or (2) a broad range of jobs in various classes, as compared to the average person with comparable training, skills and abilities. 29 C.F.R. § 1630.2(j)(3)(i). In what has come to be known as the "single job" exception, the EEOC standard provides that "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.*[25]

In this case, Respondent's restrictions substantially limit her ability to do assembly line work, the work she has done virtually all of her life. Contrary to Petitioner's

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[25] NCD has historically criticized the EEOC's "class of jobs" test and "single job" exception because of the possibility for their abuse. For example, courts have erroneously required plaintiffs to meet the criteria set forth in 29 C.F.R. § 1630.2(j)(3)(ii) in order to substantiate a claim under the third prong of the ADA's "disability" definition, *i.e.*, a claim based on being "regarded as" having a disability (as opposed to actually having a disability). As indicated by the ADA's legislative history and this Court's decision in *Arline*, 480 U.S. at 284, the proper focus with respect to a "regarded as" claim is on the allegedly discriminatory conduct of the employer, not any limitations of the plaintiff.

> [A] person who is rejected from *a* job because of the myths, fears, and stereotypes associated with disabilities would be covered under this third test, *whether or not the employer's perception was shared by others in the field* and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.

House Rep., pt. 3, at 30 (1990) (emphasis added). *See also* Senate Rep. at 24; House Rep., pt. 2, at 53.

suggestion, the fact that Ms. Williams could do the "easiest job" in the Toyota plant where she worked, Pet. Br. at 5 (citing Pet. App. 25a), cannot mean that Ms. Williams is not significantly restricted in a "class of jobs." Ms. Williams *is* significantly restricted from performing the broad range of other jobs that, within the wide class of jobs making up "assembly line work," involve the motions her impairment prevents her from performing. Petitioner relies on the district court's reasoning that the *ability* to do a single, particular job within a class of jobs means that someone is not substantially limited in working. As discussed below, that reasoning turns the EEOC regulation and this Court's decisions in *Sutton* and *Murphy*, in which the plaintiffs were able to do many other jobs within a class of jobs except one, on their heads.

Far from advising that the ability to perform a single, particular job precludes a finding that a person is significantly restricted in working, the EEOC regulations simply explicate the "class of jobs" test by explaining that the inability to perform a *single, particular* job would not be a "substantial limitation" in working.

The EEOC based the "single job" exception on express legislative history, which emphasizes the narrowness of the exception:

> A person who is limited in his or her ability to perform only a particular job, *because of circumstances unique to that job site or the materials used*, may not be substantially limited in the major life activity of working. For example, an applicant whose trade is painting would not be substantially limited in [the] major life activity of working if he has a mild allergy to a *specialized paint* used by one

> employer which is not generally used in the field in which the painter works.

House Rep., pt. 2, at 29 (emphasis added).

The EEOC also relied on cases decided under the Rehabilitation Act that illustrate that the distinction between a particular job and a class of jobs involves analyzing whether the tasks or circumstances of the job at issue are in some way unique. *See* 29 C.F.R. pt. 1630, App. (Section 1630.2(j)). The case that initially established what has become known as the "single job exception" was *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Haw. 1980). The applicant in *E.E. Black* was disqualified from all of the employer's apprentice carpenter positions after a pre-employment medical exam revealed that he had a congenital back abnormality, which the employer perceived would prevent him from doing the heavy lifting required of its apprentice carpenters. The court rejected the notion that the inability to perform a specific job necessarily constituted a substantial limitation in working because the job might be so unique that it would not affect the employee's ability to work in his/her chosen field. The court gave the following examples, which emphasize the unique aspects of what might constitute a "single job":

> . . . An individual with acrophobia who was offered 10 deputy assistant accountant jobs with a particular company, but was disqualified from one job because it was on the 37th floor . . . . An individual with some type of hearing sensitivity who was denied employment at a location with very loud noise, but was offered positions at other locations . . . .

E.E. Black, 497 F. Supp. at 1099.

In contrast to the individuals in these examples, the court concluded, the plaintiff in *E.E. Black* in fact was substantially limited in working because the employer's criteria would preclude him from doing the jobs required to become a journeyman, his chosen field. *Id.* at 1102.

In *Jasany v. United States Postal Service*, 755 F.2d 1244 (6th Cir. 1985), a former U.S. postal employee with strabismus (crossed eyes) was terminated when he became unable to operate a sorting machine due to his condition. The Sixth Circuit held that Jasany was not a handicapped individual, as his condition did not affect his ability to carry out other activities required by his job, only his work on a particular sorting machine. Similarly, in *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986), an employee with acrophobia (fear of heights) was deemed to not be substantially limited in working because he was able to work in his chosen field except when he was "unable [because of his acrophobia] to exercise his acknowledged abilities above certain altitudes." *Id.* at 935.

This Court's decisions in *Sutton* and *Murphy* involved individuals whose impairments did not "significantly restrict" their ability to pursue their chosen fields.[26] In *Sutton*, the Court held that exclusion from the

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[26] It is important to note that, in *Sutton* and *Murphy*, the Court confined the question of what other jobs the plaintiffs could perform to the class of jobs involved. This is consistent with the approach taken by the EEOC. *See* 29 C.F.R. pt. 1630, App. (Section 1630.2(j)). ("For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. *This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs.*") (emphasis added).

position of "global" airline pilot for one employer did not constitute a substantial limitation in working since "global" pilot jobs constituted a small subset of pilot jobs. *See Sutton*, 527 U.S. at 492-93 (citing 29 C.F.R. pt. 1630, App. (Section 1630.2(j)). In *Murphy*, the Court held that Mr. Murphy's ability to be a mechanic was not substantially limited if the only jobs unavailable to him were those requiring a DOT license, a small subset of the mechanic "class of jobs." *Murphy*, 527 U.S. at 524. The employer did not regard Mr. Murphy as disabled, but simply unable to attain a DOT license. *Id.*

The district court's conclusion, endorsed by Petitioner, that Ms. Williams' *ability* to do a single job "irretrievably contradicted" her claim that she was substantially limited in working is worlds apart from the position adopted by the EEOC and this Court that the *inability* to do a single job is insufficient to show substantial limitation. The ability to do any job cannot strip a plaintiff of ADA coverage and still honor the text of the ADA, which requires "substantial limitation," not total inability.

III. THE DISTRICT COURT MISAPPLIED THE STANDARDS FOR SUMMARY JUDGMENT.

Confusion over the proper subjects of inquiry for courts making disability determinations has led many lower courts, including the district court here, to impose erroneous evidentiary standards and to usurp the responsibility of juries to make factual inferences. As exemplified in this case, courts increasingly, and too often, resolve disability cases at the summary judgment stage, depriving ADA plaintiffs of a

proper and complete factfinding process, and, ultimately for many, of the remedy that they deserve.[27]

Two critical errors highlight why the district court's decision granting summary judgment was wrong. First, the district court rejected the report of Ms. Williams' vocational expert, Dr. William Weikel, on overly technical grounds and based on findings inconsistent with the applicable EEOC regulations. Second, the district court refused to recognize that evidence detailing the actual limitations on the types of things that an individual can do with his or her hands and arms – here, *inter alia*, a ban on repetitive work, lifting, or work requiring arms above head – may properly support a factfinder's inference that the individual is substantially limited in a major life activity.

The district court rejected the expert's report because, in its view, the report failed to contain all of the elements listed in the EEOC regulations as factors that may indicate a substantial limitation in working.[28] The court thereby erroneously translated the list of factors that the EEOC regulations state "*may*" be considered, 29 C.F.R. § 1630.2(j)(3)(ii) (emphasis added). into a *mandatory* checklist. A plaintiff's failure to come forward with

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[27] Some circuit courts are reversing the trend in the district courts to rule on the existence of a "disability" as a matter of law at the summary judgment stage. *See, e.g., Mullins v. Crowell*, 228 F.3d 1305 nn. 18, 21 (11th Cir. 2000); *Webb v. Garelick Manufacturing Co.*, 94 F.3d 484, 487-488 (8th Cir. 1996); *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 32 (1st Cir. 1996). *See also Arlene B. Mayerson, Restoring Regard for the "Regarded As" Prong, supra* note [ ], at n. 98.

[28] *See* Pet. App. 39a-40a.

evidence that "may" be considered does not warrant summary judgment in the defendant's favor.[29]

Furthermore, the regulations speak in terms of factors that should or may be "considered." 29 C.F.R. § 1630.2(j)(2) & (3)(ii). The district court did not assert that these factors were not considered by the expert in preparing his report. Federal law does not require that an expert report recite each bit of statistical evidence on which it is based. Most fundamentally, even if a report such as this could have been more detailed, a trier of fact nonetheless could reasonably infer from it that Williams' impairment precluded her from holding a large number of jobs. If Toyota believed that a more sophisticated report would have indicated otherwise, the company's responsibility was to adduce such evidence itself.

Even without the benefit of an expert report, a key issue in Ms. Williams' case is whether a trier of fact could reasonably infer from the basic evidence of her physical impairment that Ms. Williams would be restricted in her ability to work. Any trier of fact familiar with the functions of human hands and arms, as well as with the job market in the Louisville area – knowledge presumptively common among jurors in the Central District of Kentucky – could accurately evaluate the practical significance of Williams' impairments, regardless of whether Ms. Williams supplied a report that referenced every one of the suggested considerations cited in the EEOC guidance. Ms. Williams' case is not one where the impairment at issue is one which

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[29] In the preamble to the final ADA regulations, the EEOC emphasized that it had made a specific change from the proposed regulations in order to clarify "that the factors are *relevant to*, but are *not required elements* of, a showing of substantial limitation in working." 56 Fed. Reg. 35,726, 35,728 (1991) (emphasis added).

laymen might not readily understand, such as an esoteric neurological problem, or one in which an individual had a specialized career unfamiliar to most jurors. The district court's *per se* rule that the impairment and the restrictions it causes can *never* support an inference of "substantial limitation" was error. In the context of Ms. Williams' particular case, if Toyota thought that more detailed evidence might be probative and exculpatory on the substantial limitation issue, the company would be free to offer it at trial.

Both in refusing to accord to the jury its proper role in making evidentiary inferences and by imposing extraordinary and erroneous burdens on expert evidence, the district court transgressed the legal standards set forth by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). In *Reeves*, the Court took a strong stand against lower courts' imposing additional burdens on plaintiffs seeking remedy for discrimination, emphasizing the proper inferences that a factfinder may make regarding key elements in discrimination cases. *See id.* at 148.

Surviving summary judgment requires only that the nonmoving party have raised a "genuine issue [of] material fact." Fed R. Civ. P. 56(c). Thus, on the issue of whether a plaintiff is "disabled," the standard for denial of summary judgment is not whether the evidence proferred to show disability is conclusive or perfect, but whether it would reasonably support an inference that the plaintiff is disabled. The district court here failed to apply that standard properly.

CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

NANCY L. PERKINS
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5065

ARLENE MAYERSON*
DISABILITY RIGHTS
EDUCATION AND
DEFENSE FUND
2212 Sixth Street
Berkeley, CA 94710
(510) 644-2555

**Counsel Of Record*

Counsel for Amicus Curiae

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